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No. 80-347

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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DE JONG PACKING COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### QUESTION PRESENTED

Whether the Secretary of Agriculture correctly determined that petitioner engaged in an "unfair" practice, in violation of 7 U.S.C. 192(a), by participating in concerted action with other meat packing companies intended to compel livestock auction markets to accept unfavorable terms of trade.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-46) is reported at 618 F.2d 1329. The opinion of the Judicial Officer of the Department of Agriculture (Pet. App. C-1 to C-119) is reported at 36 A.D. 1181. The opinion of the administrative law judge (Pet. App. D-1 to D-63) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 7, 1980. A petition for rehearing was denied on June 3, 1980 (Pet. App. A-1 to A-2). The petition for a writ of certiorari was filed on September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 202(a) of the Packers and Stockyards Act, 7 U.S.C. 192(a), provides:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; * * *.

## STATEMENT

1. Petitioner De Jong Packing Company is a meat packer doing business in the State of Washington (Pet. App. C-6 to C-8). Petitioner and other meat packing companies are the major purchasers of

slaughter cattle at livestock auction markets in the northwest portion of the state (*id.* at C-12). Traditionally, cattle have been sold at these auctions (and other livestock auctions throughout the United States) on an "as is" basis. When cattle are purchased on an "as is" basis, the purchaser obtains them without any warranty that they are suitable for a particular purpose and thus bears the risk of subsequently discovered defects (*id.* at C-9 to C-10). Under regulations of the Department of Agriculture in effect during the period of time relevant to this proceeding, the purchaser was required to pay for cattle within one business day, unless otherwise agreed. 9 C.F.R. 201.43(b) (1977).

In February 1972, petitioner and nine other packers sent a joint letter to the livestock auction markets in northwest Washington (Pet. App. C-13 to C-14). The packers announced in the letter that they would henceforth purchase slaughter cattle only on the condition that the animals be fit for human consumption, as determined by subsequent inspection (*id.* at C-35 to C-36). The packers further announced that they would pay for cattle three days after the date of their auction bid and that no payment would be made for cattle that failed inspection (*ibid.*). The packers stated that they were taking this action to reduce losses resulting from the purchase of cattle that later proved to be unfit for human consumption (*ibid.*).

Several of the auction markets refused to accept these terms (Pet. App. C-14 to C-16). Moreover, the Packers and Stockyards Administration informed the packers that their concerted action violated the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, and that administrative action would be taken unless the packers rescinded their plan (Pet. App. C-16 to

C-17). Following this warning, none of the packers except petitioner attempted to buy cattle on a contingent basis; they continued to purchase cattle on an "as is" basis except for animals having visible defects (*id.* at C-17). Petitioner, however, adhered to the plan, and on eleven occasions refused to pay for cattle that subsequently failed government inspection (*id.* at C-18 to C-19). In each instance, the auction market was forced to bear the economic loss (*id.* at C-19 to C-20). The Packers and Stockyards Administration again notified petitioner that this conduct violated the Act (*id.* at C-20 to C-21).[1]

In April 1974, petitioner sent notices to all northwest Washington livestock markets that it would purchase cattle only on the terms specified in the prior letter sent jointly by the packers (Pet. App. C-22 to C-38). During the same month, three other Washington packers sent letters imposing substantially identical terms upon the auction markets (*id.* at C-22 to C-24, C-38 to C-41). A meeting was then held by the auction market owners, area farmers, national marketing association officials, and federal and state agriculture officials (*id.* at C-24 to C-25). Following that meeting, the auction markets notified the packers that they would not accept their terms (*ibid.*). In response, the packers refused to purchase any cattle at the auctions between May 1 and May 15, 1974 (*id.* at C-26 to C-28).[2]

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[1] The State of Washington also commenced an administrative proceeding leading to an order requiring petitioner to pay three of the auction markets for the cattle (Pet. App. C-21). A Washington state court reversed the administrative order, and the State did not appeal (*id.* at C-22).

[2] The packers later resumed their regular purchases on an "as is" basis (Pet. App. C-28 to C-29).

2. In January 1975, the Packers and Stockyards Administration commenced an administrative proceeding charging that petitioner and ten other packers had violated the Packers and Stockyards Act, 7 U.S.C. 192. The charges against six of the packers were resolved by default, consent decree, or dismissal (Pet. App. C-2). Following a hearing, the administrative law judge held that petitioner and four other packers violated the statute because they had engaged in a group boycott and a concerted refusal to deal with the auction markets (*id.* at D-40 to D-41). Petitioner was also found to have violated 9 C.F.R. 201.43(b) (1977) by refusing to pay for cattle that it bought within one business day (Pet. App. D-41). Petitioner and the four other packers were ordered by the administrative law judge to cease and desist from participating in a group boycott, concerted refusal to deal, or any other coercive action in combination with other packers to compel acceptance of terms of trade at a livestock auction market in Washington (*id.* at D-61 to D-69). Petitioner was also ordered to pay for cattle within one business day except as otherwise permitted by regulation (*id.* at D-62). On appeal to the Secretary of Agriculture's Judicial Officer, the findings of violation were sustained. The Judicial Officer expanded the cease and desist order to make it commensurate with the operations of the respondent meat packers and also required all of the packers to comply with the prompt payment regulation (*id.* at C-117 to C-119).

3. Petitioner and two other packers then sought review in the court of appeals pursuant to 7 U.S.C. 194. The court of appeals affirmed the administrative order, holding that the concerted actions of the packers constituted an unfair practice in violation of 7

U.S.C. 192 and that petitioner and the other packers violated 9 C.F.R. 201.43(b) (1977) by refusing to tender prompt payment (Pet. App. B-1 to B-46). The court held that there was substantial evidence to support the administrative finding that the packers had engaged in concerted action to compel changes in the terms and conditions of livestock purchases at the auction markets in 1972 and 1974 (*id.* at B-7 to B-13).[3]

In sustaining the administrative order in this case, the court of appeals observed that the conduct of the packers was substantially identical to the conduct condemned by this Court in *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930), and *United States* v. *First National Pictures, Inc.*, 282 U.S. 44 (1930). The court of appeals explained that here, as in *Paramount Famous Lasky* and *First National Pictures*, "a group of competitors have joined together for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces" (Pet. App. B-17 to B-18).[4] The court agreed with the Secretary that he had jurisdiction to curb "unfair" practices in their incipiency, before competitive harm has resulted (*id.* at B-20 to B-21). The court also recognized that the

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[3] The court of appeals set aside administrative findings that the concerted activity also violated 7 U.S.C. 192(e) and (g). See Pet. App. B-13 to B-14.

[4] The court recognized that "bidding for cattle on a 'subject' basis is perfectly legal, and that any packer acting independently is free to bid on such terms." The court explained, however, that a violation arose here because "concerted action" was used to impose the terms of trade (Pet. App. B-7).

Packers and Stockyards Act's prohibition of "unfair" practices is "broader than antecedent antitrust legislation" (*id.* at B-32), and "proscribes practices which the Sherman Act would permit" (*ibid.*).[5]

Judge Sneed dissented (Pet. App. B-34 to B-46), concluding that the administrative record in this case did not sufficiently demonstrate anti-competitive effects resulting from the challenged concerted activities. He would have remanded the case to the administrative agency for further consideration of that issue.

## ARGUMENT

The decision of the court of appeals is in agreement with the decisions of this Court and the other courts of appeals that have construed the Packers and Stockyards Act. The decision rests entirely on the Act's prohibition of "unfair" practices in the meat packing industry, and, contrary to petitioner's contention, does not raise the question whether concerted refusals to deal affecting "non-price" terms are *per se* violations of the Sherman Act. Further review by this Court is therefore unwarranted.

1. Petitioner contends (Pet. 11-27) that the present case raises the question whether *Paramount Famous*

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[5] The court of appeals expressed no views on the question whether *Paramount Famous Lasky* and *First National Pictures* adopted a "rule of reason" or *"per se"* analysis in condemning the concerted activities there involved under the Sherman Act. The court stated that "[w]e do not find it necessary to decide that question here or to suggest which mode of analysis should apply under the Sherman Act." It also noted that conduct of the kind held improper in *Paramount* and *First National* would "clearly justify issuance of a cease and desist order under [the Packers and Stockyards Act]" (Pet. App. B-33).

*Lasky Corp.* v. *United States*, 282 U.S. 30 (1930), and *United States* v. *First National Pictures, Inc.*, 282 U.S. 44 (1930), require a "*per se*" or "rule of reason" analysis of group boycotts designed to affect "non-price" terms. However, the court of appeals expressly declined to reach that issue (Pet. App. B-33). Both *Paramount Famous Lasky* and *First National Pictures* were decided under the Sherman Act, 15 U.S.C. 1. As the court below correctly held (Pet. App. B-32), it is well settled that the Packers and Stockyards Act's prohibition of "unfair" practices (7 U.S.C. 192(a)) reaches beyond the prohibitions of the Sherman Act. See, *e.g.*, *Swift & Co.* v. *United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Wilson & Co.* v. *United States*, 286 F.2d 891, 895 (7th Cir. 1961). See also *Stafford* v. *Wallace*, 258 U.S. 495, 513-515, 521 (1922). In enacting this remedial legislation in 1921, Congress observed that, if it "did not go any further than existing law on the subject, there would not be much use of enacting it * * *." 61 Cong. Rec. 1805 (1921) (remarks of Rep. Anderson). See also 61 Cong. Rec. 1805-1806, 1887-1888 (1921) (remarks of Reps. Anderson, Rayburn and Tincher).[6] In short, since the present administrative proceeding is not circumscribed by the standards of the Sherman Act,

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[6] The Packers and Stockyards Act's prohibition of "unfair" practices is no less expansive and perhaps even more expansive than Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. *Swift & Co.* v. *United States, supra*, 393 F.2d at 253. This Court repeatedly has recognized under Section 5 of the Federal Trade Commission Act that the administrative agency may "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); see also *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953).

it presents no occasion for determining what elements of proof are required in Sherman Act suits.

2. The court of appeals correctly held that petitioner's participation in a group boycott to compel the acceptance of unfavorable trade terms was an "unfair" practice under 7 U.S.C. 192(a). The concerted actions of the packers in this case were designed to shift from themselves significant economic losses and to impose those losses on the stockyards and their suppliers. While the packers were free to negotiate for a change in trade terms on a unilateral basis or seek administrative relief, it was not permissible for them to engage in a group boycott to impose such a result. As this Court observed in *Stafford* v. *Wallace*, *supra*, 258 U.S. at 514-515, the very purpose of the Packers and Stockyards Act was to protect cattle suppliers from the unrestrained economic power of packers. This Court has also recognized that the remedial purposes of the statute are served by preventing packers from engaging in concerted refusals to deal. *United States* v. *American Livestock Co.*, 279 U.S. 435, 436-437 (1929). In view of these precedents and the Act's prohibition of any "unfair" practice, the Secretary acted within his statutory authority when he ordered the packers to cease and desist from engaging in concerted actions "for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces" (Pet. App. B-17 to B-18).[7] As the court of appeals correctly

[7] Although petitioner argues that the boycott in this case was intended to affect only a "non-price" term, the boycott substantially impinged on the stockyards' expected quid pro quo from their sales to the packers. As the Judicial Officer explained (Pet. App. C-51): "No one would even attempt,

concluded, the statute was enacted by Congress to halt unfair practices in their incipiency and no showing of actual competitive harm is required. See *Stafford* v. *Wallace*, *supra*, 258 U.S. at 520; *Swift & Co.* v. *United States*, *supra*, 393 F.2d at 253.[8]

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at this late date, to justify an agreement among competitors to pay $18 per cwt. for a certain type of slaughter cow. Why respondents think they can justify an agreement among themselves to pay zero dollars per cwt. for a certain type of slaughter cow (*i.e.*, one later condemned) is beyond comprehension." Cf. *Catalano, Inc.* v. *Target Sales, Inc.*, No. 79-1101 (May 27, 1980), slip op. 3-7.

[8] The Judicial Officer and Administrative Law Judge fully explained their reasons for concluding that the challenged practices were unfair and harmful (Pet. App. C-46 to C-55, C-59 to C-60, D-40 to D-47). The packers' actions are not exempt from the Act's prohibition simply because they were motivated by business considerations. The packers may pursue commercial advantages through independent negotiation, but not through group boycotts aimed at the imposition of contractual terms. As the judicial officer observed, "each group had valid business reasons for its position on the respective merits of 'as is' and 'subject' sales" (Pet. App. C-31). He also observed that "condemnation rates on slaughtered cattle in the State of Washington are not out of line with the rest of the United States * * * " (*ibid.*) and added that it is often impossible to determine whether the "farmer or the packer was responsible for the condemnation * * * " (*id.* at C-32).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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